



2. The petitioner has diagnoses of Intractable Myoclonic Epilepsy, SCN-1A Gene Mutation and Borderline Intellectual Functioning. He is on a Ketogenic Diet. His ketone level in his urine must be tested two times a day. The petitioner suffers from seizures. In 2015 the petitioner had 18 seizures. When he has a seizure, he has emergency seizure medication that is administered.
3. The petitioner is in the fifth grade at [REDACTED]. His IQ is 76. Despite his IQ his individualized education plan (IEP) states that he is reading at grade level. He received a B in his regular math class. He receives accommodations with testing. He has all the questions read out loud to him in a small group. If he scores poorly, he can retake the test with the questions read out loud only to him, instead of the small group. He has an aide with him at all times. His meals and eating are very closely monitored due to his special diet.
4. Despite the fact that the petitioner is closely monitored, he is independent with eating, dressing, grooming, and toileting. He needs the water temperature set for him and supervision when he is bathing due to his seizures. He participates in choir, golf, swimming, 4-H, and piano lessons.
5. On November 30, 2015 the Department sent the petitioner a letter stating that he no longer met the level of care requirement for the Katie Beckett program, and that his eligibility would end effective December 30, 2015.
6. On December 23, 2015 the Division of Hearings and Appeals received the petitioner's Request for Fair Hearing.

### **DISCUSSION**

The purpose of the "Katie Beckett" waiver is to encourage cost savings to the government by permitting disabled children, who would otherwise be institutionalized, to receive MA while living at home with their parents. Sec. 49.47(4)(c)1m, Wis. Stats. The agency is required to review Katie Beckett waiver applications in a five-step process. The first step is to determine whether the child is age 18 or younger and disabled. The petitioner continues to meet this first standard (this step caused some confusion in this case because the Disability Bureau found that petitioner remained disabled on November 1, 2011, and then just two months later petitioner received the notice of discontinuance that led to this appeal). The second step is to determine whether the child requires a level of care that is typically provided in a hospital, nursing home, or ICF-MR. The agency determined that petitioner does not require this level of care. (The remaining three steps are assessment of appropriateness of community-based care, costs limits of community-based care, and adherence to income and asset limits for the child.)

The Department developed a policy manual, issued in January, 1993, which defines and describes childhood care levels. The level of care criteria were updated most recently in February, 2011. A policy document for levels of care for all children's long term support programs was issued in that month. It can be found on the internet at <https://www.dhs.wisconsin.gov/clts/cltsloc.pdf>. There currently are four levels of care: hospital (HOS), nursing home (NH), psychiatric hospital for severe emotional disorders (SED), and intermediate care facility for the developmentally disabled (ICF-DD1 or DD2).

In order to be eligible for the hospital (HOS) or nursing (NH) level of care a person must have a physical impairment. To qualify under the HOS LOC a person must have a chronic, persistent, and unstable medical condition with an expected duration of six months or more, and needs that would generally be met in an in-patient hospital setting. To qualify under the NH LOC a person must (1) have a diagnosis of a medical/physical condition resulting in needs requiring long term care services; and (2) require skilled nursing interventions and/or have substantial functional limitations requiring hands on assistance from others throughout the day.

In this case the petitioner does not have a physical impairment that rises to the level of either the HOS or NH LOC. The petitioner is independent in his activities of daily living. Although he requires close

monitoring due to his seizure disorder, he does not need skilled nursing interventions. While at school he is monitored by a school aide who is able to administer his medication during a seizure.

The petitioner does not qualify under the SED LOC because he does not have emotional disturbances. He is an outgoing social child who participates in many activities including choir, golf, swimming, 4-H, and piano lessons.

The petitioner was previously eligible for the Katie Becket program under the Developmental Disabilities LOC category (ICF-DD1 or DD2). A child meets this LOC if the child meets the following three criteria: (1) the child has a diagnosis of a **Cognitive Disability** that substantially impairs learning and that is expected to continue indefinitely; and (2) the child demonstrates **Substantial Functional Limitations** when compared to age appropriate activities that are expected to last a year or longer; and (3) the child has the **Need for Active Treatment**. A child has a cognitive disability if the child has a diagnosis of a cognitive disability (i.e. autism spectrum disorder, down syndrome, genetic or chromosomal disorders, and more) **and** the diagnosis has led to substantial learning impairments. In order to qualify as a substantial learning impairment the child must have a 30% or greater delay in aggregate intellectual functioning, **or** a score of at least 2 standard deviations below the mean on valid, standardized and norm referenced measures of aggregate intellectual functioning.

In determining whether a child has a cognitive disability, the manual offers the following example:

A child whose school testing shows evidence of learning disabilities that require a more structured educational environment plus other special modifications to address the child's individual learning style. The child continues to reason, problem-solve, and learn at a reasonable functional level even though she is behind same aged peers. *This child's functional limitations with regard to cognitive capacity do not demonstrate substantial impairments in learning and therefore this child would not meet Criterion 1.*

Thus, even if a child has a diagnosis of a cognitive disability, the child may not be eligible for the Katie Becket program when the child is functioning reasonably well at school with extra help and accommodations.

In this case the petitioner previously qualified under this Development Disabilities LOC category because he had a substantial learning impairment. The petitioner no longer has a substantial learning impairment. His IQ is 76. This is less than 2 standard deviations below the mean. In addition, he has not shown that he has a 30% or greater delay in aggregate intellectual functioning. Although he receives additional services and accommodations through his IEP he is reading at grade level, he received a B in his regular math class, and he participates in choir, golf, swimming, 4-H, and piano lessons. The petitioners' parents highlight that the only reason the petitioner is doing so well is because of an extreme amount of effort on the family's and petitioner's part. I have no reason to doubt this. The petitioner is fortunate to have a very supportive and helpful family who do everything that they can for him. However, based upon the record before me I must conclude that at this point in time the petitioner does not have a substantial learning impairment, and is no longer eligible for the Katie Becket program.

I note that I have considered that the petitioner's seizure disorder has gotten worse. The issue is that the seizure disorder does not affect the petitioner's intellectual functioning. The petitioner qualified for the Katie Becket program under the Developmental Disabilities LOC category (ICF-DD1 or DD2). This LOC category is not based on the petitioner's physical functioning. This seizure disorder does not rise to the level required for the Katie Becket program under the nursing home or hospital LOC as discussed above. If this seizure disorder causes the petitioner to miss significant school resulting in a substantial learning impairment, then he may reapply for the program.

**CONCLUSIONS OF LAW**

The petitioner no longer meets the level of care required for Katie Beckett eligibility.

**THEREFORE, it is**

**ORDERED**

That the petition is dismissed.

**REQUEST FOR A REHEARING**

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

**APPEAL TO COURT**

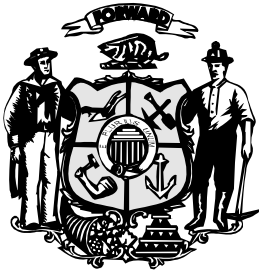
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,  
Wisconsin, this 2nd day of March, 2016

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\sCorinne Balter  
Administrative Law Judge  
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on March 2, 2016.

Bureau of Long-Term Support  
Division of Health Care Access and Accountability